No. 94-167

In the Supreme Court of the United States

OCTOBER TERM, 1994

KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS

v.

DIRK A. LAMAGNO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. 2679(d), that a government employee was acting within the scope of employment conclusively requires that the United States be substituted for the employee as the defendant in a civil action.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 10-20) is unreported, but the decision is noted at 23 F.3d 402 (Table). The orders of the district court (J.A. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1994. The petition for a writ of certiorari was filed on July 25, 1994, and was granted on November 14, 1994. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4564, states in relevant part:

> (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
>
> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.
>
> (3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) [*sic*] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

28 U.S.C. 2679(d)(1)-(3).

STATEMENT

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671-2680 (1988 & Supp. V 1993), allows suits against the United States for injuries resulting from the negligent or wrongful acts or omissions of federal government employees acting within the scope of their office or employment. See 28 U.S.C. 1346(b), 2672 (1988 & Supp. V 1993). The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4564, amended the FTCA to provide that, if a federal employee is sued for a negligent

or wrongful act or omission, and the Attorney General certifies that the employee was acting within the scope of office or employment, the United States shall be substituted as the defendant. See 28 U.S.C. 2679(d). The issue in this case is whether the Attorney General's certification is conclusive for purposes of substitution or whether it is subject to judicial review. The court of appeals followed its prior decision in *Johnson* v. *Carter*, 983 F.2d 1316, 1319 (4th Cir.) (en banc), cert. denied, 114 S. Ct. 57 (1993), and concluded that, if the Attorney General certifies that the federal employee acted within the scope of employment, the court has "no discretion" to deny substitution.

1. Congress enacted the FTCA in 1946 to provide a federal remedy for claimants alleging tortious injury on account of the actions of federal employees taken within the scope of their employment. Act of Aug. 2, 1946, ch. 753, §§ 401-424, 60 Stat. 842-847. Although the Act waived the United States' sovereign immunity in significant respects, it "did not assure injured persons damages for all injuries caused by such employees." *Dalehite* v. *United States*, 346 U.S. 15, 17 (1953). The FTCA allows a plaintiff to sue the United States in federal district court

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b).

The FTCA's statutory remedy is subject to specific preconditions and exceptions. For example, the claimant

is not entitled to seek judicial relief unless he "shall have first presented the claim to the appropriate Federal agency" for settlement or adjustment. 28 U.S.C. 2675(a); see 28 U.S.C. 2672 (1988 & Supp. V 1993); *McNeil* v. *United States*, 113 S. Ct. 1980 (1993). In addition, the claimant may not seek relief against the United States for claims that fall within thirteen enumerated categories, including claims based on the performance of a "discretionary" function, 28 U.S.C. 2680(a); see *United States* v. *Gaubert*, 499 U.S. 315 (1991); *Dalehite* v. *United States*, *supra*, and claims "arising in a foreign country," 28 U.S.C. 2680(k); see *Smith* v. *United States*, 113 S. Ct. 1178 (1993); *United States* v. *Spelar*, 338 U.S. 217 (1949).

The FTCA incorporates principles similar to the common law doctrine of respondeat superior, which allows a plaintiff to sue a private employer for torts committed by employees acting within their scope of employment. See 5 F. Harper, F. James, Jr., & O. Gray, *The Law of Torts* 1-60 (2d ed. 1986). Under state common law, a plaintiff normally can elect to supplement (or forgo entirely) the respondeat superior remedy by bringing suit directly against the private employee who personally caused the injury. See *id.* at 5. Until 1988, many federal courts had held, however, that the judicial doctrine of official immunity, see *Barr* v. *Matteo*, 360 U.S. 564 (1959), precluded an analogous state-law tort suit against a federal employee for conduct within the scope of the employee's office or employment. See, *e.g.*, *General Electric Co.* v. *United States*, 813 F.2d 1273, 1276-1277 (4th Cir. 1987), vacated, 484 U.S. 1022 (1988); *Poolman* v. *Nelson*, 802 F.2d 304, 307 (8th Cir. 1986).

This Court considered that issue in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), and rejected the view that federal employees may rely on official immunity whenever they act within the scope of their employment. The Court concluded that "conduct by federal officials must be

discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability." *Id.* at 295. The Court reasoned that "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature." *Id.* at 296. "It is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'" *Id.* at 297 (quoting *Barr* v. *Matteo*, 360 U.S. at 571 (opinion of Harlan, J.)).

Congress responded to the Court's decision by enacting the so-called Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563. Congress stated in its legislative findings that judicial rulings, such as the *Westfall* decision, had "seriously eroded the common law tort immunity previously available to Federal employees." § 2(a)(4), 102 Stat. 4563. It found that "[t]he prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the [FTCA] as the proper remedy for Federal employee torts." *Ibid.* Congress accordingly enacted the Westfall Act for the express purpose of "protect[ing] Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." § 2(b), 102 Stat. 4564.

The Westfall Act furnishes that protection by declaring that the FTCA is an "exclusive" remedial mechanism for injuries caused by the tortious conduct of a government employee "acting within the scope of his

office or employment." 28 U.S.C. 2679(b)(1). The Act specifically states that

> [a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

Ibid. The Westfall Act ensures that, if a claimant sues the federal employee based on conduct "within the scope of [the employee's] office or employment," the United States will be substituted as the defendant and the suit will proceed against the government under the FTCA. The Act provides as follows:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. 2679(d)(1).

The Westfall Act provides an identical certification procedure for civil actions commenced in state court. 28 U.S.C. 2679(d)(2). In that situation, the Attorney General's certification establishes the basis for both substitution of the United States and removal of the action "to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending." *Ibid.* The Westfall Act provides in that context that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." *Ibid.*

If the Attorney General declines to certify that a federal government employee was acting within the scope of employment, "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3). If the court concludes that the federal employee was acting within the scope of employment, the United States "shall be substituted as the party defendant." *Ibid.*

The Attorney General may delegate certification authority under the Westfall Act to subordinate officers. See 28 U.S.C. 510. The Attorney General has delegated that authority to the United States Attorneys, who make certification determinations in consultation with the Department of Justice. See 28 C.F.R. 15.3(a).

2. Petitioners are citizens of the Republic of Colombia. They allege that on January 18, 1991, Dirk A. Lamagno, a Special Agent employed by the Drug Enforcement Administration (DEA), caused an automobile accident in Barranquilla, Colombia. Lamagno was the driver of a government-owned Ford Bronco that collided with the car in which petitioners were occupants. Petitioners seek general and specific damages for physical injuries and property damage. They filed an administrative claim with the DEA pursuant to Section 709 of the Controlled Substances Act (as amended by the Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 13, 93 Stat. 1048 (1979)), which authorizes settlement of tort claims that "arise in a foreign country in connection with the operations of the [DEA] abroad." 21 U.S.C. 904. The DEA lacked authority to resolve a claim in the dollar amount that petitioners requested and referred the claim to the

Department of Justice. The Department has not made a final administrative decision on that claim. J.A. 11-12.[1]

On January 15, 1993, petitioners filed this diversity action against Lamagno in the United States District Court for the Eastern District of Virginia. See 28 U.S.C. 1332(a)(2). The United States Attorney certified on behalf of the Attorney General that Lamagno was acting within the scope of his office or employment under the Westfall Act, 28 U.S.C. 2679(d), and moved to substitute the United States as the defendant. J.A. 1-6. The district court substituted the United States in place of Lamagno and dismissed him from the action. J.A. 7-8. The United States then moved to dismiss the suit on the ground that the United States has retained its immunity for suits based on "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The district court granted that motion and dismissed the action. J.A. 9.

The court of appeals affirmed the order of the district court substituting the United States as defendant in place of Lamagno. J.A. 10-20. It held that, under the law of the circuit, a certification by the Attorney General that an employee was acting within the scope of his office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. J.A. 19-20. The court relied specifically on its prior decision in *Johnson* v. *Carter*, *supra*, which held—over the Justice Department's objection—that once the Attorney General has issued a scope-of-employment certification, the court has "no discretion" to deny substitution. 983 F.2d at 1319-1320.

The *Johnson* decision arose from a traffic violation at the Norfolk Naval Base. Johnson, a civilian member of

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[1] The United States has proposed a settlement of petitioners' claims. Petitioners rejected the government's offer on August 31, 1994, and provided a counter-offer.

the Naval Base Security Force, stopped a motorist for speeding, and the motorist complained to her father, a high-ranking naval officer at the base, that Johnson was rude. The naval officer, whose responsibilities included naval base traffic management, contacted Johnson and criticized his conduct. Johnson later sued the naval officer in state court alleging slander and other torts. The federal district court allowed the United States Attorney to remove the action to federal court and substitute the United States as defendant based on the United States Attorney's certification that the naval officer "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(2); see 28 C.F.R. 15.3(a). The en banc court of appeals affirmed that decision, holding that the "plain language" of the Westfall Act gave the district court "no discretion" to deny substitution. 983 F.2d at 1319. The court of appeals panel in this case concluded that the *Johnson* decision was controlling and that the district court here similarly had "no discretion" to question the United States Attorney's certification that Lamagno was acting within the scope of his employment. J.A. 19-20.

The court of appeals also rejected petitioners' challenge to the district court's order dismissing the suit against the United States. J.A. 14-18. As to that issue, the court of appeals concluded that Section 709 of the Controlled Substances Act, 21 U.S.C. 904, did not provide a basis for petitioners' suit, because that provision is not a waiver of sovereign immunity and because it does not provide for judicial review of the Attorney General's actions on tort claims arising in a foreign country. J.A. 15-16. The court of appeals also rejected petitioners' argument that their claim is based on "headquarters" negligence originating in Arlington, Virginia, and therefore is not barred by 28 U.S.C.

2680(k). J.A. 16-18. Those issues are not before the Court. See 115 S. Ct. 507 (1994) (limiting the grant of certiorari to Question 1).

SUMMARY OF ARGUMENT

A certification by the Attorney General or her designate under the Westfall Act that a federal employee was acting within the scope of the employee's office or employment is not conclusive on the question whether the United States shall be substituted as the defendant in place of the employee. The Westfall Act does not expressly state that the Attorney General's certification is subject to judicial review. Nevertheless, the most reasonable construction of the Act allows a plaintiff to challenge the Attorney General's certification with respect to substitution.

Under established federal practice, a plaintiff is normally entitled to challenge a motion to join a new party or to substitute a new party for the named defendant. The Westfall Act contains no indication of an intention to deny a plaintiff a similar opportunity to challenge the substitution of the United States. The fact that the substitution in Westfall Act cases is predicated upon the Attorney General's certification does not compel a different result. The courts normally presume that Congress intends judicial review of executive action that falls within the traditional competence of courts to evaluate. That presumption may be appropriately invoked here, where the Attorney General's scope-of-employment certification is submitted to the court in the course of litigation, where the certification has legally binding consequences for the parties, and where it involves an issue—scope of employment—that the courts have traditionally evaluated.

The history, text, and structure of the Westfall Act support that presumption. The Westfall Act was

patterned on prior legislation, the Federal Drivers Act (codified at 28 U.S.C. 2679 (1982)), that contained a similar certification procedure. The courts had routinely reviewed certification decisions under the Federal Drivers Act. The Westfall Act modified that practice with respect to removal, explicitly stating that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2). But the Act is silent on the question whether the Attorney General's certification is conclusive for other purposes. The most reasonable inference is that Congress did not intend the Attorney General's certification to be conclusive on the question of substitution. That result reasonably accommodates the interests of all of the parties. It allows the United States to make the initial determination whether a federal employee was acting within the scope of government employment, while preserving the right of a dissatisfied plaintiff or federal employee to obtain a judicial determination of the matter.

This Court should accordingly reverse the judgment of the court of appeals and remand the case for further proceedings. In urging that result, we do not accept petitioners' unproven allegations regarding the federal employee's conduct in this case, nor do we question the validity of the United States Attorney's scope-of-employment certification. We simply submit that the certification may be challenged in district court.

ARGUMENT

THE ATTORNEY GENERAL'S CERTIFICATION UNDER THE WESTFALL ACT THAT A GOVERNMENT EMPLOYEE WAS ACTING WITHIN THE SCOPE OF EMPLOYMENT DOES NOT CONCLUSIVELY REQUIRE THE FEDERAL DISTRICT COURT TO SUBSTITUTE THE UNITED STATES FOR THE EMPLOYEE AS THE DEFENDANT IN A TORT ACTION

This case presents a question under the Westfall Act that has divided the federal courts of appeals. The Fourth Circuit has held in this case and in its en banc decision in *Johnson* v. *Carter*, 983 F.2d. 1316, cert. denied, 114 S. Ct. 57 (1993), that the Attorney General's certification under 28 U.S.C. 2679(d) that a federal employee was acting within the scope of employment conclusively requires a court to substitute the United States as the defendant in place of the named federal employee.[2] Seven other circuits, however, have adopted

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[2] Two circuits have issued decisions that contain language consistent with the Fourth Circuit's position. See *Aviles* v. *Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Mitchell* v. *Carlson*, 896 F.2d 128 (5th Cir. 1990). In *Aviles*, the Tenth Circuit suggested in dicta that the Attorney General's certification should be given conclusive effect on substitution. In that case, however, the complaint itself alleged that the defendants had "act[ed] within the scope of their government employment." 887 F.2d at 1047. *Mitchell* also contains language suggesting that the Attorney General's certification should be given conclusive effect on substitution, see 896 F.2d at 136, but the Fifth Circuit has recently granted a suggestion for rehearing en banc on that question. See *Garcia* v. *United States*, No. 92-8490. The question is also presented in a petition for certiorari seeking review of another Fifth Circuit decision. See *King Fisher Marine Service, Inc.* v. *Perez*, No. 94-48.

the approach that we think is correct.[3] They hold that the Attorney General's certification decision is not conclusive on the question of substitution and is subject to challenge in the tort litigation.[4]

A. The Language Of The Westfall Act Does Not Preclude A Judicial Challenge To The Attorney General's Scope-Of-Employment Certification

The Fourth Circuit's decision in *Johnson* rests on what the court perceived as the "plain language" of the Westfall Act. 983 F.2d at 1319. The court reasoned that "the language of the statute is clear and unambiguous. If the Attorney General certifies that the defendant employee was acting within the scope of his employment, 'the United States *shall* be substituted as the party defendant.'" *Id.* at 1320-1321 (quoting with added emphasis 28 U.S.C. 2679(d)(2)). The court concluded that

[3] See *Schrob* v. *Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); *Brown* v. *Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *Meridian Int'l Logistics, Inc.* v. *United States*, 939 F.2d 740, 744-745 (9th Cir. 1991); *Hamrick* v. *Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir.), cert. denied, 112 S. Ct. 200 (1991); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1543 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 112 S. Ct. 62 (1991); *Nasuti* v. *Scannell*, 906 F.2d 802, 812-814 (1st Cir. 1990); *Arbour* v. *Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

[4] Immediately after enactment of the Westfall Act, the United States took the position in litigation that the Attorney General's scope-of-employment certifications are conclusive and unreviewable. See, *e.g.*, *Petrousky* v. *United States*, 728 F. Supp. 890, 891 (N.D.N.Y. 1990). Upon further consideration, the United States changed its position. See Br. for United States in Opp. in *Lehtinen* v. *S.J. & W. Ranch, Inc.*, cert. denied, 112 S. Ct. 62 (1991) (No. 90-1789); see also Br. for Resp. in Opp. in *Johnson* v. *Carter*, cert. denied, 114 S. Ct. 57 (1993) (No. 92-1591).

this language gives "no discretion" to the district court. *Id.* at 1319.

As this Court has explained, however, "the meaning of statutory language, plain or not, depends on context." *Brown* v. *Gardner*, No. 93-1128 (Dec. 12, 1994), slip op. 3; *King* v. *St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991). The specific context of the language involved here strongly suggests that a plaintiff may challenge the validity of the Attorney General's certification. The judicial rules governing joinder of parties are commonly phrased in mandatory terms. See, *e.g.*, Fed. R. Civ. P. 19(a) (persons "shall be joined" if certain conditions are met); Fed. R. Civ. P. 24(a) ("anyone shall be permitted to intervene" if certain conditions are met). Parties are nevertheless entitled to challenge joinder on the ground that the legal or factual predicates for adding new parties have not been satisfied, and the federal district courts are responsible for resolving those questions. See Fed. R. Civ. P. 21, 25. See generally 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* §§ 1681-1689 (2d ed. 1986).

The Westfall Act does not expressly prohibit courts from resolving analogous disputes over the propriety of substitution under that Act. Congress, which is "predominantly a lawyer's body," *Albernaz* v. *United States*, 450 U.S. 333, 341-342 (1981), was presumably aware that courts ordinarily determine the existence of the predicates for joinder and substitution when those are challenged by a party to the litigation. Yet the Westfall Act contains no indication that Congress intended to deny the courts their traditional role in this area. Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

The Fourth Circuit's construction of the Westfall Act would allow a court to inquire whether the Attorney General has issued a scope-of-employment certification, but it would preclude any inquiry into whether the Attorney General's certification rests on a sound legal or factual foundation. That result is unsound. The Westfall Act does not categorically forbid a court from examining the basis for the Attorney General's certification, and an implication that the Act precludes that inquiry would be inconsistent with the "strong presumption" that Congress normally allows judicial review of executive action. See, *e.g.*, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670-673 (1986); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

As a general matter, the question whether a statute allows a judicial challenge is determined from its "express language" and also from "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). Although the Court normally presumes that Congress intends judicial review, that presumption is not always controlling. See *id.* at 348-352. Furthermore, it applies only to matters within the competence or traditional authority of the courts to decide. See *Department of Navy* v. *Egan*, 484 U.S. 518, 526-530 (1988); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). Nevertheless, the presumption is deeply imbedded in American law.

As this Court noted in *Bowen*, Chief Justice Marshall "laid the foundation for the modern presumption of judicial review" in *United States* v. *Nourse*, 34 U.S. (9 Pet.) 8 (1835), which recognized that a "distress" warrant issued by the Treasury Department was subject

to judicial challenge. See *Bowen*, 476 U.S. at 670. The Chief Justice stated in *Nourse* that "[i]t would excite some surprise" if the government were able to seize property through executive process and leave the owner with "no remedy, no appeal to the laws of his country." 34 U.S. (9 Pet.) at 28-29. He concluded that "this imputation cannot be cast on the legislature of the United States." *Id.* at 29 (quoted in *Bowen*, 476 U.S. at 670).[5]

The proposition that a plaintiff cannot obtain judicial review of the Attorney General's scope-of-employment certification under the Westfall Act might similarly "excite some surprise." That certification is submitted to a court in response to pending litigation and may have significant, and even dispositive, consequences for the resolution of the underlying claims. The Westfall Act requires that, after substitution, the suit against the United States shall proceed under the FTCA. See 28 U.S.C. 2679(d). In many cases, including this one, substitution of the United States will determine the outcome of the litigation, because the FTCA imposes significant substantive limitations on the types of tort claims that are cognizable against the United States. See 28 U.S.C. 2679(d)(4), 2680; see generally *United States* v. *Smith*, 499 U.S. 160 (1991). Similar limitations would generally not be applicable if substitution did not occur and the case proceeded against the individual defendant.

The courts, which have a long history of evaluating scope-of-employment issues under the common law, are

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[5] The imputation could not be "cast on the legislature" in that case because Congress had expressly authorized injunctive relief. Act of May 15, 1820, ch. 107, § 4, 3 Stat. 595. *Nourse* nevertheless demonstrates the long lineage of the presumption favoring judicial review. See *Bowen*, 476 U.S. at 670.

fully competent to address the appropriateness of certification. See 5 F. Harper, F. James, Jr., & O. Gray, *The Law of Torts* 23-60 (2d ed. 1986). The issue is not one that has traditionally been reserved to the Executive Branch. Compare, *e.g.*, *Saltany* v. *Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (giving conclusive effect to the United States' suggestion that a head of state possesses sovereign immunity), aff'd in relevant part, rev'd in part, 886 F.2d 438, 441 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990). In these circumstances, it is proper to presume that in the Westfall Act Congress has adhered to its "traditional observance" of a plaintiff's right to obtain judicial review of the government's scope-of-employment certification. See *Bowen*, 476 U.S. at 670.

B. The History, Text, And Structure Of The Westfall Act Support The Presumption That Congress Intended To Allow A Judicial Challenge To The Attorney General's Scope-Of-Employment Certification

The presumption of judicial review, "like all presumptions used in interpreting statutes," may be overcome by a "fairly discernible" indication of contrary legislative intent. *Bowen*, 476 U.S. at 673; *Block*, 467 U.S. at 349. No such intent is evident here. To the contrary, the history, text, and structure of the Westfall Act all strongly suggest that a tort plaintiff may contest substitution of the United States through a court challenge to the Attorney General's scope-of-employment certification.

In the first place, the settled law at the time of the enactment of the Westfall Act gave Congress strong reason to expect that the Attorney General's scope-of-employment certifications would be subject to judicial review. At that time, federal district courts routinely examined the question of scope of employment in the

course of determining whether they had jurisdiction over actions against the United States under the FTCA's jurisdictional provision, 28 U.S.C. 1346(b). See, *e.g.*, *Hatahley* v. *United States*, 351 U.S. 173, 180-181 (1956); *Andrews* v. *United States*, 732 F.2d 366, 370 (4th Cir. 1984); *Hoston* v. *Silbert*, 681 F.2d 876, 878-880 (D.C. Cir. 1982); *United States* v. *Stewart*, 201 F.2d 135, 136-138 (5th Cir. 1953); *King* v. *United States*, 178 F.2d 320, 321-322 (5th Cir. 1949), cert. denied, 339 U.S. 964 (1950); see also *Armiger et al. Estates* v. *United States*, 339 F.2d 625, 628-630 (Ct. Cl. 1964) (congressional reference case).

It was also established that courts were able to consider challenges to the Attorney General's scope-of-employment certifications under the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. 2679 (1982)), which served as the model for the Westfall Act. The Federal Drivers Act declared that the FTCA was the "exclusive" remedy for injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. 2679(b) (1982). It contained a scope-of-employment "certification" procedure, similar to that contained in the Westfall Act, which stated that, upon the Attorney General's certification in a state court action that the employee was acting within the scope of employment, the action "shall be removed" to federal district court and "the proceedings deemed a tort action brought against the United States" under the FTCA. 28 U.S.C. 2679(d) (1982). The district courts routinely resolved challenges to the Attorney General's certifications under the Federal Drivers Act when determining whether the case was properly removed and the United States was properly substituted as the defendant. See, *e.g.*, *Seiden* v. *United States*, 537 F.2d 867, 869-870 (6th Cir. 1976); *Levin* v. *Taylor*, 464 F.2d 770, 771 (D.C. Cir. 1972);

Daugherty v. *United States*, 427 F. Supp. 222, 224 (W.D. Pa. 1977).

If Congress had intended to depart from that established practice in the Westfall Act and make the Attorney General's scope-of-employment certifications conclusive on the courts, one would expect that it would have done so explicitly. Congress did, in fact, modify the practice in one specific respect. The Westfall Act included a provision stating:

> Th[e] certification of the Attorney General shall conclusively establish the scope of office or employment *for purposes of removal.*

28 U.S.C. 2679(d) (emphasis added). Congress thus explicitly precluded judicial review of the certification decision with respect to removal. See *Aliota* v. *Graham*, 984 F.2d 1350, 1355-1356 (3d Cir.) (ruling that a district court may not remand a Westfall Act case to state court, even if it concludes that the scope-of-employment certification was erroneous), cert. denied, 114 S. Ct. 68 (1993). Congress did not state, however, that the Attorney General's certification would also "conclusively" establish the scope of office or employment for purposes of substitution. "'[I]t is generally presumed that Congress acts intentionally and purposely,' when it 'includes particular language in one section of a statute but omits it in another.'" *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994). It is therefore most natural to conclude that Congress intended in the Westfall Act that the courts would continue to have authority to review scope-of-employment certifications for purposes of substitution. Accord *Keene Corp.* v. *United States*, 113

S. Ct. 2035, 2040 (1993); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[6]

Indeed, Congress in the Westfall Act deliberately expanded the role of the courts with respect to substitution issues. The Westfall Act included provisions, not present in the Federal Drivers Act, allowing a federal employee who failed to obtain a scope-of-employment certification from the Attorney General to "petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3). "The Federal Drivers Act, which preceded the 1988 changes, had no such specific provisions." 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims* 6-56 (1994). The new provisions provide additional and compelling evidence that Congress intended that federal courts would examine the scope-of-employment issue in order to determine the propriety of substituting the United States.

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[6] The legislative history supports the conclusion that Congress intended judicial review of scope-of-employment certifications. During a House committee hearing on the Westfall Act, Representative Frank, a co-sponsor of the bill and chairman of the Subcommittee conducting the hearing, stated his understanding that "the plaintiff would still have the right to contest the certification if they thought the Attorney General were certifying without justification." See *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 128 (1988); see also *id.* at 197. Deputy Assistant Attorney General Robert Willmore, testifying on behalf of the Department of Justice, concurred in that view, stating that "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." *Id.* at 133. Nothing in the legislative history contradicts that understanding.

A construction of the Westfall Act that includes judicial review of scope-of-employment certifications thus provides a reasonable accommodation of the interests of tort plaintiffs, federal employees, and the United States. If a plaintiff believes that a federal employee committed a tort while acting outside the scope of employment, the plaintiff may sue that employee rather than the United States. See 28 U.S.C. 2679(b). If the Attorney General nevertheless certifies that the employee was acting within the scope of employment, the United States has a conclusive right to remove an action in state court to a federal forum; and for any action in federal court, the United States may substitute itself as the defendant unless the plaintiff shows that certification was unwarranted. See 28 U.S.C. 2679(d)(1) and (2). If the Attorney General refuses to certify that the employee was acting within the scope of employment, the employee may nonetheless petition the court to find and certify that the United States, rather than the employee, is the proper party. See 28 U.S.C. 2679(d)(3).

C. The Court Should Remand This Case For Further Proceedings

The Fourth Circuit's conclusion that the Westfall Act gives the district court "no discretion" to consider petitioners' objection to the Attorney General's scope-of-employment certification rests on the less persuasive of the two possible constructions of the statute. Accordingly, this Court should reverse the court of appeals' judgment and remand the case for further proceedings that would allow petitioners to present their objection to substitution in the district court. In urging that result, we do not suggest agreement with petitioners' assertions respecting Lamagno's conduct, which rest upon the unproven allegations set forth in petitioners' complaint. Nor do we question the correctness of the United States

Attorney's scope-of-employment certification in this case. Contrary to the court of appeals' decision, however, the scope-of-employment certification is not conclusive for purposes of substitution, and it may be challenged by petitioners on remand in the district court.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

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